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Article 7

Criminal Law - Forcibly Retaking Money Lost at Gambling

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The Wisconsin and the Nebraska Courts agree on the object, the interpretation, and the constitutionality of such a statute. Thus the Nebraska court has said that the object of such a statute is to "promote the cleanliness and safety of the municipality" and a reasonable police regulation is not invalid simply because it may incidentally affect the exercise of some right guaranteed by the constitution. *In re Anderson,* 69 Neb. 686, 96 N.W. 149 (1903).

The Michigan and Illinois courts do not agree with Wisconsin and Nebraska. In Michigan, an ordinance read "no person shall himself, or by another . . . circulate, distribute or give away circulars, handbills or advertising cards of any description upon any of the public streets and alleys of said city." Upon a set of facts similar to the principal case, the constitutionality of the ordinance was questioned, and it was held to be an unreasonable and unwarranted restriction of freedom of speech and the press. *People* v. *Armstrong,* 73 Mich. 288, 41 N.W. 275 (1889). This case was cited with approval and followed in *Chicago* v. *Schultz,* 341 Ill. 208, 173 N.E. 276 (1930).

The Wisconsin Supreme Court was aware of the Michigan and the Illinois decisions when the *Kassen* case, supra, was decided and in that connection said "the difference between the Illinois case is probably irreconcilable and proceeds from a difference in the interpretation of the ordinance." The Wisconsin court says that only such distribution as would litter up the streets or public property is prohibited and the Illinois court says that the ordinance would prohibit the distribution of all printed matter, including newspapers.

—WILLIAM P. KINGSTON.

Criminal Law—Forcibly Retaking Money Lost at Gambling.—The defendant was charged by information with having committed the crime of robbery by feloniously taking from another the sum of $198.00, accomplished by means of force and fear.

During the several months prior to the date of the alleged offense the defendant had frequented a gambling parlor and in all had lost approximately $1,000.00. On the night of the alleged robbery the defendant had gambled and lost $55.00

Under the method of "pay-off" in this particular place, the holders of winning tickets were required to cash them by presenting these tickets to one Whitcomb, who deducted four per cent as a discounting charge. Whitcomb moved back and forth between the gambling parlor and his shop across the hall and carried money from the former to the latter, sometimes in loose bills and other times in a tin box. He kept a separate fund in a box in his shop from which he paid the winners. It was from that box that the defendant took the sum of $198.00, which was its entire cash contents. It is undisputed that the defendant was armed with a pistol and that he accomplished his purpose by putting Whitcomb in fear.

The defendant was tried on his plea of not guilty and convicted of robbery in the first degree. He appealed from the judgment of conviction and from the order denying his motion for a new trial.

On appeal, *held,* reversed, the element of felonious intent essential to the crime of robbery is lacking even in the absence of a statute giving to the loser a right of action to recover money so lost, and even though the money reclaimed may not have been the identical money lost by him. *People* v. *Rosen* (Cal. 1938), 78 P. (2d) 727.

By the weight of authority, it is not robbery to forcibly retake money lost in an illegal game, providing of course, that the state in question has a recovery statute giving to the loser a right of action to recover money so lost.

Thus, in *Thompson* v. *Commonwealth,* 13 Ky. L. Rep. 916, 18 S.W. 1022 (1892)) it was not robbery for a person who had lost money at an unlawful game to point a pistol at the winner to compel him to return the money, for, in Kentucky, the winner is not even entitled to possession of the money.

In Utah, it was held to be error to refuse to give the following instruction: "That if they (the jury) should find that the defendant acted under a bona fide impression and honest belief that the money taken was his and that he had a right to it, they render a verdict of not guilty." *People* v. *Hughes,* 11 Utah 100, 39 Pac. 492 (1895).

Similarly in *Sikes* v. *Commonwealth,* 17 Ky. L. Rep. 1353, 34 S.W. 902 (1892), it was held that it was not robbery for a person, who, having lost money at an unlawful game, compels its return by pointing a pistol at the winner.

However if the winner is at the same time compelled to surrender not only his winnings, but also some of his own individual money, then the one taking by force and putting in fear would be guilty of robbery, *Grant* v. *State,* 115 Ga. 205, 41 S.E. 698 (1902).

The minority view, in the absence of statutes, makes it a felony to forcibly retake money lost in an illegal game. The state of Texas, having no recovery statute, is typical of those states which likewise have no statutes permitting a right of recovery, and which adhere to the minority view.

Thus, in *Carroll* v. *State,* 42 Tex. Crim. Rep. 30, 57 S.W. 99 (1900), it was held that one who after voluntarily delivering money to another, which the latter had won from him by gambling, retakes it from the winner by force and by putting him in fear of life and bodily injury, is guilty of robbery. However, in Texas, title passes when one loses to another at a game of chance as distinguished from those states which have recovery statutes. Hence in *Coker* v. *State,* 71 Tex. Crim. Rep. 448, 160 S.W. 366 (1913), it was held that if the party voluntarily delivers the money lost to the winner's actual possession, the winner owns the money, so that the forceful retaking of it may constitute robbery. Also *Blain* v. *State,* 34 Tex. Crim. Rep. 448, 31 S.W. 368 (1895).

Wisconsin has no decision on this question. It would seem, however, that this state would adhere to the majority view because it has a typical recovery statute. "Any person who, by playing at any game or by betting or wagering on any game . . . shall have put up or deposited with any stake holder or third person any money, property or thing in action, or shall have lost and delivered the same to any winner thereof may within three months after such putting up, staking or depositing, sue for and recover the same . . . " WIS. STAT. (1937) § 348.10.

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Municipal Corporations—Torts—Liability for Failure to Keep Streets in Reasonably Safe Condition—Liability for Failure to Maintain Traffic Signals. —The defendant city placed a hard rubber stop sign about two feet long, one-half inch thick and eight inches in height in the center of K Street where it intersects Houston Street, to notify motorists that the latter was a "through street." This stop sign was allowed to become invisible by reason of its having been worn down to the level of the ground. The deceased was a guest in an automobile proceeding along K Street towards the intersection. Both the driver